Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ARTHUR GAVLOCK; ADAM WALTZ; JAMES P. PLETCHER; ROBERT FLOYD; JEAN FLOYD,

Petitioners

v.

CLINT DENIKER WCO; WCO WASSERMAN; DOTY MCDOWELL WCO; RONALD STOUT, Supervisor; VERNON ROSS

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether American citizens have the right to protect their real property from destruction by a non-native, unendangered species introduced by their state government to roam uninhibited over private lands?

2. May a state government subject American citizens to prosecution for defending their lives and property from destruction by wildlife that is non-native to the state in question, and in which the state has no interest?

3. In conducting a de novo review does an appellate US Court of Appeals have as a standard of review issue the responsibility to visit the matters presented to it?

PARTIES TO THE PROCEEDINGS

The Petitioners are Arthur Gavlock, Adam Waltz, James P Pletcher, Robert Floyd and Jean Floyd, who are Pennsylvania citizens living in Clinton County. The Petitioners are all members in a public interest group "Citizens against the Exploitation of Private Property Rights" ("CAEPPR") which has a goal to protect its property owner members from damage caused by elk that were brought from outside of the state and released in North-Central Pennsylvania by the Pennsylvania Game commission.

The Respondents are five officials of the Pennsylvania Game Commission.

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The Opinion of the United States Court of Appeals for the Third Circuit, which is appealed from here, was filed on April 11, 2006 ("Appendix A"). The relevant opinion of the United States Court for the Middle District of Pennsylvania was filed on May 27, 2005 ("Appendix B").

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 2006 and this petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part; "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth amendment to the United States Constitution reads as follows: the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

STATEMENT OF THE CASE

This is a civil rights case arising under the First, Fourth and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983. Petitioners suffered a long period, over many years, of horrific and expensive destruction to their property by wild elk that reside in their area. The plaintiffs sought relief from the Pennsylvania Game Commission, but received only opposition and resistance. As a result, the plaintiffs and other similarly situated property owners formed a citizens' action group "CAEPPR" (Citizens against the Exploitation of Private Property Rights).

After having unique, rare, and extremely valuable apple trees on his property destroyed by the elk over a period of years, and being rebuffed by the state, petitioner Robert Floyd shot an elk that was attacking his fruit trees. He was prosecuted and found not guilty. However, as a result, he and the other plaintiffs had their homes and vehicles searched unlawfully without probable cause. Petitioner Adam Waltz was the victim of an assault by respondent Deniker a state game official. The United States District Court for the Middle District of Pennsylvania granted summary judgment for the defendants on petitioners' claims. The District Court found that although petitioner Floyd may have a qualified state right to protect his property from damage done by wildlife, based upon state law, *Commonwealth v. Hagen, 44 D&C 4th 516*, the right to kill an elk threatening life or property i.e. to protect one's

property is not an interest protected by the substantive due process clause of the 14th amendment should the state decide to prosecute you. In short, the District Court and the Third Circuit Court of Appeals held that the state can import non-native non-endangered (this is not an endangered species issue) species of destructive wild animals and turn them loose with impunity and prosecute you should you defend yourself and your property.

Furthermore, neither the District Court, nor the Third Circuit Court of Appeals, in clear violation of the applicable standard of review, allowed the petitioners to visit the obvious first amendment issues implicated in the respondents' actions. The subject search warrants clearly indicated that the petitioners were being prosecuted and searched because of their membership in "CAEPPR". In contrast to the Third Circuit opinion below, and the refusal to address the issues raised on appeal, the Third Circuit

Court of Appeals has previously stated that "although it has yet to clearly define the category of property interests protected by the concept of substantive due process...ownership of property is worthy of such protection." *DelBlasio v. Zoning Board*, 53 F.3d 592 (3d Cir.1995). This Court should therefore take this opportunity to resolve this issue, which is of considerable importance to property owners throughout the country, and particularly to citizens of Pennsylvania because the Third Circuit Court of Appeals not only refuses to address the underlying issue of his acting in contravention of its existing law.

1. Western Elk, which were introduced to this area by the Game Commission, around the year 1913, have developed a herd, which currently roam throughout Elk, Cameron and Clinton Counties Pennsylvania. It is important to note that the elk in Pennsylvania are not adapted to the

habitat there. Consequently they caused tremendous damage that local species do not, particularly to trees and shrubs. The elk that the game commission brought into Pennsylvania from the Far West are a western species (grazers) that are not native to lands east of the Mississippi i.e. they are a grazing species and have never been a woodland species), unlike the extinct Eastern Wood Elk, which was a woodland browser and were about half the size of their Western relatives. Pennsylvania's native Whitetail deer, are also browsers. These Western elk, imported and set loose in Pennsylvania's mountains, without legislative authority, by bureaucrats nearly 100 years ago, cause horrific damage to the property of the residents of those counties where they roam. Elk have been known to ruin siding on houses and destroy landscapes and cultivation. In the rut they have attacked children. They strip entire orchards. The plaintiffs in this case sought assistance from the Game Commission for relief from this destruction. In response the Game Commission offered only threats and some cosmetic remedies which were useless and were known by the Game Commission to be useless. Since these measures proved not be effective, the plaintiffs formed "CAEPPR" (Citizens Against the Exploitation of Private Property Rights) a citizen's action group. They appealed to, and met with, legislators and media persons. For this they became the object of persecution. Neither the District Court nor the Third Circuit Court of Appeals would visit this issue even though the search warrants utilized by respondents on their face made an issue of their membership in CAEPPR

On June 5, 2003, plaintiff Robert Floyd witnessed an elk attacking rare and irreplaceable apple trees that he had on his property. As a result, he shot the elk. Thereafter he contacted plaintiff Waltz who notified the other plaintiffs,

who met at the Floyd residence. Waltz contacted the Pennsylvania Game Commission to request their assistance in removing the carcass of the deceased animal.

Respondents Deniker and McDowell, responded to the call and went to the Floyd residence. When they arrived, petitioner Waltz told them that the Floyds were in the house, but were not coming out. Waltz gave them the business card of the Floyd's attorney and asked that the officers make arrangements to talk to the Floyds through him. Despite these representations, respondents Deniker and McDowell persisted in talking to the plaintiffs directly instead of going through their attorney. They went through the Floyd's yard toward their door. Mr. Waltz had already been moving to the door. Waltz who was licensed to do so entered the house. After Waltz entered the house he attempted to shut the door. Respondent Waltz repeated that the Floyds did not wish to be bothered and that the Officers should really speak to their lawyer as they had requested. Waltz then turned to proceed through the house, at which point he was attacked from behind by defendant Deniker and was severely injured permanently.

On July 29, 2003, Wasserman filed a summary citation charging Floyd with a violation of 34 Pa.C.S.A. §2307.[1] On August 6, 2003, Wasserman obtained a warrant to search the Floyd residence for the firearm that was used to shoot the elk. The gun, a rare artifact, was totally unneeded for any law enforcement purpose. The search warrant was executed the next day, after Jean Floyd told Wasserman that the firearm was not in the house and had been sold to petitioner Art Gavlock. Wasserman did not find the firearm at the Floyd residence.

After Wasserman left the property, Jean Floyd notified Waltz about the search, who in turn, informed Gavlock and Pletcher. Gavlock and Pletcher decided to go to the Waltz residence. On their way there, they were followed by respondent Wasserman. When they got to the Waltz residence, Wasserman attempted to approach Gavlock, who was already entering the Waltz residence. Angered by the plaintiff's actions in defying his authority, although the actions that they took were entirely legal, he set up surveillance across the road from the Waltz residence and blocked them in. Wasserman then got search warrants for Gavlock's home and Pletcher's vehicle (not Waltz's residence). He had no reason to suspect the firearm was in the van. These actions were to harass and intimidate and served no other purpose. Plaintiffs filed this action in the District Court for violations of their First, Fourth and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983. After discovery, the respondents moved for summary judgment, which the District Court granted.

The District Court dismissed the malicious prosecution claims of petitioner Robert Floyd .[2] Floyd argues that he had a right under the Fourteenth Amendment to protect his property and that the shooting of the elk that was engaged in the destruction of his property was justified. The District Court found that Floyd may have a qualified state right to protect his property from damage done by wildlife under the Pennsylvania law (see *Commonwealth v. Hagan*, 44 Pa. D&C 4th 516, 548-549 (Elk County Ct. 2000) creating common law exception for killing game or wildlife if "reasonable necessity" or "justification" exists). However the District Court nonetheless held that a violation of substantive due process is no basis for a §1983 malicious

prosecution claim and that probable cause existed to charge Floyd with a violation of Section 2307(a).

Petitioner Robert Floyd also placed a claim of malicious prosecution for being prosecuted and being required to attend the trial on the charges of violation of Section 2307(a). The District Court found that being charged with a minor offense and being required to attend trial are minimal restraints of liberty that do not amount to a Fourth Amendment seizure.[3]

The District Court also dismissed the claims by plaintiffs Robert and Jean Floyd, Gavlock and Pletcher that the searches of their residences and vehicle were a violation of their Fourth Amendment rights. The District Court concluded that under the totality of the circumstances, probable cause existed to search the petitioner's property despite there being absolutely no evidence involving Pletcher in anything. The District Court also failed to properly address petitioner's argument that the searches violated their rights because obtaining the firearm was totally unnecessary for the prosecution of the charge against Floyd who admitted he shot the elk. The District Court merely stated these facts were irrelevant to the review of petitioners' claims.

The District Court dismissed petitioner Waltz's claims of violations of his Fourth Amendment rights for the excessive force that was used against him by the respondent Deniker. The District Court found that a reasonable jury "could" determine that Deniker used excessive force and failed to grant the defendants' motion for summary judgment on that claim. However, the Court found Deniker had

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[3] The District Court relied upon the case of DiBella v. , 2005 WL 1118012 at *1 in which the Third Circuit ruled that "[a]ttending one's trial is not a government seizure in a 42 U.S.C. § 1983 malicious prosecution action.

qualified immunity in that a reasonable officer could believe that he had the right under the law to act in the way that he did (i.e. enter a home and beat up a citizen) and therefore dismissed this claim.[4]

The District Court also dismissed the petitioner's claims under the First Amendment for the harassing, intimidating and selective prosecution petitioners received from the respondents for speaking out against government policies and for participating in CAEPPR.[5] The District Court found petitioners couldn't establish that the protected activity was a substantial or motivating factor in the retaliatory action and granted summary judgment on this issue even though the search warrants clearly involved demonstrated the deterrent purpose behind the harassment. In The Court of Appeals affirmed the decision of the District Court without discussion and stated that they affirm substantially for the reasons set forth by the District Court.

REASONS FOR GRANTING THE WRIT

I. There is a Dispute Among the Courts as to Whether an American Citizen Has the Right to Protect Real Property from Being

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[4] Qualified immunity exists if (1) the facts allege a deprivation of an actual constitutional right, and if so, (2) whether the right was clearly established at the time of the alleged violation. Saucier v. Katz, 533 U.S. 194, 200 (2001). The Court found that Waltz may believe that the law gave him a right to restrain Waltz.

[5] To establish a claim of First Amendment retaliation, plaintiffs must show:

(1) they engaged in protected activity; (2) defendants retaliated by taking adverse action against the plaintiffs; and (3) the protected activity was the cause of the retaliation. Anderson v. Davila, 125 F.2d 148, 161 (3d Cir.1997).

II. Destroyed by an Animal that is the Property of the State or protected by law.

The Due Process Clauses of the Fifth and Fourteen Amendments protect a citizen's property rights from destruction. The Third Circuit Court of Appeals has stated that "although it has yet to clearly define the category of property interests protected by the concept of substantive due process...ownership of property is worthy of such protection." *DelBlasio v. Zoning Board*, 53 F.3d 592 (3d Cir.1995). The United States Supreme Court has previously expressed the right of a person to defend their property in the cases of *Moore v. East Cleveland*, 431 U.S. 494 (1977) and *Beard v. United States*, 158 U.S. 550 (1895). In those cases this Court stated that "Having the freedom to take actions necessary to protect one's property may well be a liberty "deeply rooted in this nation's history and tradition."

In granting defendants' motion for summary judgment, this Court found that killing an elk, even one that was causing destruction to property, is not a fundamental right so deeply rooted in our concept of ordered liberty that it could be considered a liberty interest protected by the Fourteenth Amendment. In reaching this holding, the Court relied upon a holding from the Tenth Circuit Court of Appeals that stated that there is no entitlement to compensation for damage to property caused by wildlife under the Fifth Amendment. See, *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1430-31 (10th Cir.1986). However in this case, the issue is more expansive. Here the state says I'm going to prosecute you or imprison you if you kill this animal even though it is destroying your property. In short, you must suffer the destruction of your property, or suffer prosecution and even incarceration.

In reaching its holding, the District Court stated tha petitioner Floyd may have a qualified state right to protec his property from damage done by wildlife unde Pennsylvania law. This Court should hear this issue t resolve the dispute and define the rights of property owner to protect their property when t reatened with destruction.

III. THIS IS A RECURRENT ISSUE WHICH MAY AFFECT MANY PROPERTY OWNERS ON WHICH THIS COURT SHOULD ESTABLISH A UNIFORM AND PREDICTABLE FEDERAL STANDARD.

Pennsylvania law provides that a person wh cultivates as a primary means of gaining a livelihood ma kill game or wildlife to protect their property. See, 3 Pa.C.S.A. § 2121. Additionally, there is case law tha creates a common law exception for killing game or wildlif if "reasonable necessity or justification exists". Howeve there is no clear definition of what constitutes reasonabl necessity or justification that can be understood by propert owners to be within their right to defend their property.

There is no question that this issue will recur in th future. There are wildlife throughout the country that ha been claimed as state property. It is foreseeable that thes animals, which include a wide range of species, will caus property damage and that other property owners will seek t protect their property from this damage. This Court shoul take this opportunity to clearly provide law to state exactl what are the rights of property owners to protect thei property when threatened with destruction.

Further, there is a national concern, voiced almost daily in the press, in the Congress, and in state legislatures about decision-making in our courts. In this case, issues which were worthy of discussion and review were brushed aside for undisclosed reasons. This group of American citizens are deeply responsible loyal people who have fought in our wars and who pay taxes to support a nation to which they pledge an unquestioned allegiance. They deserve a response to questions appertaining to First Amendment rights which were never addressed, let alone to fourth amendment violations to which qualified immunity clearly does not apply. More importantly and indeed most important they organize themselves together and raised a public outcry after years of abuse. If the courts below could look to all the facts and conclude that probable cause existed to search a van that was clearly not involved in any wrongdoing or carrying any contraband of a crime then how can the logic of the retaliation for political purposes and for speaking out not be presented to a jury as a jury question? Issues appertaining to the standard of review which is increasingly and commonly avoided by our courts, should cause of this Court to bring some discipline into the system and provide guidance and admonishment on the growing problem of court nullification in our nation. Our founding fathers wrote that no greater approbation could be gained from the citizenry than providing a reliable and consistent court system to resolve disputes.

CONCLUSION

For the reasons stated above this Court should grant certiorori. The issue of how citizens can respond to destructive wildlife has arisen before in both a constitutional and a statutory context. The lower courts did not address this issue thoroughly or appropriately. With the arrival of wolves in Yellowstone (although they are a native species there) unlike the elk here, and were additionally placed there lawfully, and the resurgence of black bear populations and even mountain lions in the eastern United States, let alone transplanted non-native species as here, there are more and more conflicts. The greatest underlying issue here however deals with the First Amendment right of citizens to speak out, as citizens, on matters of public concern, while law enforcement officials directly organized investigative and prosecutorial efforts around that protected speech. There is a confluence of 1st and 14th amendment rights that this Court should address.

Respectfully Submitted,

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APPENDIX "A"

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2910

ARTHUR GAVLOCK; ADAM WALTZ; JAMES P. PLETCHER; ROBERT FLOYD; JEAN FLOYD,

Appellants

v.

CLINT DENIKER WCO; WCO WASSERMAN; DOTY MCDOWELL WCO; RONALD STOUT, Supervisor; VERNON ROSS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

D.C. Civil No. 04-cv-00247

District Judge: The Honorable James F. McClure
Submitted Under Third Circuit LAR 34.1(a)

March 30, 2006

Before: McKEE, BARRY and VAN ANTWERPEN, Circuit Judges
(Filed: April 11, 2006)

OPINION

1 Clint Deniker, John Wasserman and Doty McDowell ar Wildlife Conservation Officers ("WCOs"), Vernon Ross i the Executive Director of PCG, and Ronald Stout is th Federal Aid Officer/WCO Supervisor.

2 There is an exception for landowners who obtain incom off the plants or trees grown on their land, § 2121(a) and (c) but Floyd does not come within this exception.

3 The gun was never found because appellants shuttled i around in order to prevent the PGC officers from locating it.

BARRY, Circuit Judge

Appellants, Arthur Gavlock, Adam Waltz, James F Pletcher, Robert Floyd, and Jean Floyd, appeal from th District Court's grant of summary judgment in favor o appellees, Vernon Ross, Ronald Stout, Clint Deniker, Joh Wasserman, and Doty McDowell. Appellants are al members of Citizens Against the Exploitation of Privat Property Rights ("CAEPPR"), a group which opposes th Pennsylvania Game Commission's elk management policie Appellees are Pennsylvania Game Commission ("PGC" officials. In June 2003, Robert Floyd shot and killed an el that had its head in one of his apple trees. Unde Pennsylvania law, a landowner is not permitted to kill a animal that is causing damage to his property. 34 Pa. CS § 2307.2 The PGC investigated the shooting. The Distric Court carefully examined the factual circumstance surrounding the incident and the subsequent PG investigation, and we need not repeat that discussion. It wi suffice for our purposes to note that the investigatio included a search of Floyd's residence, Gavlock's residence and Pletcher's car in an effort to locate the gun that was use to shoot the elk.3 Ultimately, a summary citation was file against Floyd, charging him with a violation of § 230 Although the District Justice did not believe Floyd shot th elk lawfully, he found him not guilty, a finding based on

Floyd's advanced age and the District Justice's belief that Floyd had been influenced by others to commit the offense. In February 2004, appellants brought action under 42 U.S.C. § 1983, alleging that appellees violated their First, Fourth, and Fourteenth Amendment rights during the course of their investigation of the incident. Specifically, they alleged that: (1) Appellees infringed upon their alleged constitutional right to kill elk that are causing damage to their property; (2) the prosecution of Robert Floyd was a malicious prosecution; (3) the searches of Floyd's residence, Gavlock's residence, and Pletcher's car were unlawful and in violation of their Fourth Amendment rights; (4) Deniker, Wasserman, and Stout falsely imprisoned Waltz, Gavlock, and Pletcher by parking across the street from Waltz's residence and observing the premises; (4) PGC officer Deniker used excessive force against Waltz while trying to gain access to the Floyd residence on the day of the shooting; and (5) appellees violated their First Amendment rights by retaliating against them for speaking out against the PGC's elk policies. Following discovery, the District Court granted summary judgment to the defendants on all but the excessive force claim, and dismissed that claim on the ground of qualified immunity. The District Court ruled, in the alternative, that defendants would be entitled to qualified immunity with respect to all of the claims that were dismissed on appeal, appellants' challenge the District Court's ruling on all but their false imprisonment claim summary judgment. This appeal followed.4 The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

We review de novo an order granting summar judgment. *Saldana v. Kmart Corp.*, 260 F.3d 228, 231 (3 Cir. 2001). Summary judgment is proper when, viewing th evidence in the light most favorable to the nonmoving party there is no genuine issue of material fact and the movin party is entitled to judgment as a matter of law. *Id.* at 232 Fed. R. Civ. P. 56(c). In its comprehensive opinion date May 27, 2005, the District Court carefully analyzed all o appellants' various claims and found them to be withou merit. We will not reprise that discussion only to reach th same result. Accordingly, we will affirm substantially for th reasons set forth by the District Court.

APPENDIX "B"
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ARTHUR GAVLOCK, ADAM WALTZ, JAMES P. PLETCHER, ROBERT FLOYD, and JEAN FLOYD

No. 4:04-CV-0247

Plaintiffs

VS: **Judge McClure**

WCO CLINT DENIKER, WCO WASSERMAN, WCO DOTY MCDOWELL, SUPERVISOR RONALD STOUT, and VERNON ROSS,

Defendants

M E M O R A N D U M
May 27, 2005

BACKGROUND:
Plaintiffs Arthur Gavlock, Adam Waltz, James P. Pletcher, Robert Floyd, and Jean Floyd initiated this civil rights action on February 3, 2004 by filing a complaint under 42 U.S.C. § 1983 alleging violations of the First, Fourth, and Fourteenth Amendments to the United States Constitution against five defendants, all of whom are officials of the Pennsylvania Game Commission (PGC): Executive Director Vernon Ross, Federal Aid Officer/Wildlife Conservation Officer (WCO) Supervisor Ronald Stout, and WCO's Clint Deniker, John Wasserman, and Doty McDowell. Plaintiffs' claims stem from a June 3, 2003 incident in which Robert Floyd shot and

killed an elk on his property that was hungrily eyeing hi apple trees.

The elk was allegedly killed in violation of th Pennsylvania Game and Wildlife Code, 34 Pa. C.S.A. § 10 et seq., which prohibits the unjustified, unlicensed, out-of season killing of wildlife. Plaintiffs allege that defendant violated their civil rights while investigating the shootin and while searching for the firearm allegedly used to kill th elk. Now before the court is defendan motion for summar judgment. For the following reasons, the court will grant th motion.

DISCUSSION:

I. The Summary Judgment Standard

Summary judgment is appropriate if there are no genuin issues of material fact in dispute and if the moving party i entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-4 (1986); Beers-Capitol v. Whetzel, 256 F.3d 120, 130 n.6 (3 Cir. 2001).

An issue is "genuine" if a reasonable jury could fin for either party. See Anderson, 477 U.S. at 249. "Material facts are those that might affect the outcome of the case. Id at 248. Initially, the moving party bears the burden of statin the basis for its motion and identifying those portions of th record which demonstrate the absence of a genuine issue o material fact. Celotex, 477 U.S. at 323. "It can discharge tha burden by showing'--that is, pointing out to the distric court--that there is an absence of evidence to support th nonmoving party's case." Id. at 325. Once the moving part points to evidence demonstrating that no genuine issue of

material fact exists, the nonmoving party has the duty to set forth specific facts showing that a genuine issue of material fact does exist and that a reasonable fact-finder could rule in its favor. Ridgewood Bd. of Educ. v. N.E., ex rel. M.E. 172 F.3d 238, 252 (3d Cir. 1999) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). Although "[s]peculation and conclusory allegations do not satisfy this duty," Ridgewood, 172 F.3d at 252 (citing Groman v. Township of Manalapan, 47 F.3d 628, 637 (3d Cir. 1995)), all inferences are made in a light most favorable to the nonmoving party. See Saucier v. Katz, 533 U.S. 194, 201 (2001); Marino v. Indus. Crating Co., 358 F.3d 241, 247 (3d Cir. 2004).

II. Statement of Relevant Facts

We briefly recite the relevant, material facts. To the extent the parties 1 For specific provisions pertaining to the PGC, see generally 34 Pa. C.S.A.§§ 301-328.disagree over the factual details, we draw all inferences in a light most favorable to plaintiffs, the nonmoving parties.

The series of events precipitating this action really date back to about 1913. Thereabouts, a group of elk was brought to Pennsylvania, the roughly 700 descendants of which currently roam in Elk, Cameron, and Clinton Counties, and possibly in Jefferson and Centre Counties as well. (Defs.' Stmt. of Facts, Rec. Doc. No. 12, at ¶1.) Now move forward about 85 years. In late 1998, the Pennsylvania Game Commission (PGC), which is charged with enforcing the Pennsylvania Game and Wildlife Code, 34 Pa. C.S.A. § 101 et seq.,1 instituted a trap and transfer program in which they moved about 20 to 25 elk from Elk County into areas of Clinton County. (Rec. Doc. No. 12, at ¶3.) This program irked some citizens of Clinton County because elk can cause substantial property damage. The PGC attempted to ease

human-elk tensions in Clinton County in various ways, such as by providing property owners with cracker shells and rubber shot bullets to scare the animals away, employing chemical deterrents, darting animals to tranquilize and then remove them from a location, hiring biologists to track problem animals, and offering fencing programs to landowners. (Id. at ¶6.) Some Clinton County residents though, felt that these measures failed to deal adequately with the problem. As a result, in 1999, some residents including plaintiffs Adam Waltz, Arthur Gavlock, and James Pletcher, formed Citizens Against the Exploitation of Private Property

Rights (CAEPPR). Seeking to prevent elk destruction of private property, CAEPPR advocated fencing in thousands of acres of state land to keep elk from roaming onto private property. (Id. at ¶11.) Plaintiff Robert Floyd attended two CAEPPR meetings, although he does not think anyone knew he was a member of CAEPPR. (Id. at ¶¶26-27.) In the past, the PGC had offered CAEPPR members including Waltz, Gavlock, Pletcher, and Robert Floyd deterrents such as rubber shot and cracker shells as well as fencing. Some individuals, including some of the plaintiffs questioned the effectiveness of these deterrents and declined fencing. (Id. at ¶¶14- 16, 18-24, 28.) Since 1999, Waltz has shot and killed about nine elk on his property. He contacted the PGC each time to remove the elk. The PGC removed all the elk and never had any problem with Waltz, because he raises produce and crops for a living and is therefore entitled to shoot elk under 34 Pa. C.S.A. § 2121, which permits persons who cultivate land as a primary means of gaining a livelihood to shoot wildlife in certain circumstances. (Id. at ¶22.) Gavlock has never contacted the PGC about specific incidents of property damage caused by elk. (Id. at ¶14.) On

June 5, 2003, Robert Floyd shot an elk on his property that was hungrily eyeing his apple trees. After shooting the elk, Robert Floyd called Waltz, who in turn called Pletcher, Thomas Shearer, and Robert Peno to rendevous at the Floyd residence. Upon arriving at the Floyd residence, Waltz anonymously called the PGC and asked that someone remove the elk carcass. Officers Deniker and McDowell responded to the call. Upon arriving at the scene, Waltz said he spoke for the Floyds and that the Floyds did not want to talk, nor were they coming out, and that the officers were not going into the Floyds' home. Waltz also handed Deniker the business card of Craig Miller, Esq., and said that attorney Miller represented the Floyds and that the officers should speak with him. (Id. at ¶¶29-30, 35.) Officers Deniker and McDowell indicated they were going to investigate the killing of the elk and wanted to speak with the Floyds. As the officers proceeded to the outer door of the Floyd residence, Waltz got to the door first and attempted to shut it. Deniker blocked the door from closing with his hand and reiterated he needed to speak with Robert Floyd. Waltz repeated that the Floyds did not wish to be bothered and that Deniker should speak with attorney Miller. (Id. at ¶¶37-38, 42-43.) Waltz then began walking toward the inner door of the house. As he did so, Deniker grabbed Waltz from behind initially in a "bear hug." Waltz yelled "let go" and tried to get loose. Once Waltz stopped resisting, Deniker released him and told Waltz he was interfering with a PGC investigation. Deniker then knocked on the inner door but was unable to make contact with the Floyds because they refused to answer. (Id. at ¶¶45-47, 51.) Failing to make contact with the Floyds, the officers proceeded to remove the elk carcass. Later analysis of the carcass revealed the caliber

of bullet that kill the elk and what types of firearms coul have fired the bullet. (Id. at ¶¶51, 59.) Later, on June 15 2003, Robert Floyd sent a notarized letter to the PGC i which he admitted to shooting the elk and stated that th PGC should contact his attorney, Miller. Officer Wasserma was assigned to the investigation. Wasserman spoke wit attorney Miller in an attempt to obtain the firearm used t kill the elk. After two discussions, attorney Miller tol Wasserman that he no longer represented the Floyds and tha he did not have the firearm. (Id. at ¶¶59, 60-67.) Sometim between or after these two discussions, attorney Mille informed Waltz and Gavlock, who in turn informed Robe Floyd, that Wasserman would likely get a search warrant fo the firearm. To avoid turning over the firearm, Robert Floy signed a sales agreement selling his Parker Hale 30-06 t Gavlock for 2 Section 2307(a) provides: It is unlawful fo any person to aid, abet, attempt or conspire to hunt for o take or possess, use, transport or conceal any game o wildlife unlawfully taken or not properly marked or any pa thereof, or to hunt for, trap, take, kill, transport, concea possess or use any game or wildlife contrary to th provisions of this title one dollar with a buyback option a the same price. His wife Jean Floyd and Waltz signed th agreement as "witnesses." The intent of the agreement wa to keep the firearm from the authorities. (Id. at ¶¶68-69, 8(81.) On July 29, 2003, Wasserman filed a summary citatio against Floyd charging him with a violation of 34 Pa. C.S.A § 2307.2 It was served by mail. Shortly thereafter, on Augu 6, 2003, Wasserman obtained a warrant to search the Floy residence for the firearm. He executed the search warrant th next day. While executing the search warrant for the Floyd

residence, Jean Floyd informed Wasserman about the sales agreement and the purposes behind it. The firearm was not found at the Floyd residence. (Id. at ¶¶72-73, 77, 79-81.) After Wasserman left her home, Jean Floyd called Waltz about the search. Waltz called Gavlock and Pletcher. Very shortly after the search, Wasserman observed Gavlock riding along as a passenger of Pletcher's in Pletcher's vehicle. Wasserman followed them to Waltz's residence. He asked to speak with Gavlock, but Gavlock ignored Wasserman and entered Waltz's residence. Wasserman positioned himself across the road to surveil the residence and radioed for assistance. When Deniker and Supervisor Ronald Stout arrived, Wasserman left to obtain search warrants for Gavlock's home and Pletcher's vehicle because he believed Gavlock, as the "purchaser" of the firearm, either had it at his home or was transporting it in Pletcher's vehicle after Jean Floyd tipped them off about the earlier search of her home. (Id. at ¶¶83-85, 87-88, 97-98.) Meanwhile, Deniker and Stout observed several other CAEPPR members and others arrive at Waltz's home. People came and went to Waltz's home without the surveilling officers stopping or otherwise preventing them from leaving. (Id. at ¶¶90-93.) Wasserman later returned and executed the search warrant for Pletcher's vehicle but did not find the firearm. Wasserman then executed the search warrant on Gavlock's residence with Deniker and Stout but they did not find the firearm. (Id. at ¶¶97-98, 101, 103.) The firearm was never found.

Robert Floyd entered a not guilty plea to the summary offense on August 1, 2003. On September 26, 2003, Robert Floyd was found not guilty of the summary offense because of his age and because of the district

justice's belief that Floyd may have been influenced by others, not because he did not shoot the elk. Since these events, CAEPPR members have continued to voice their opposition to the PGC's elk program, and have not felt as though they have been prohibited from doing so. (Id. at ¶¶72, 104, 112.)

III. Defendants' Arguments

We address the issues in the order presented by the parties, to wit:

1) Does Robert Floyd have a constitutional right under the Fourteenth
Amendment to kill any elk which causes property damage, and if so was
that right infringed?
2) Was Robert Floyd the victim of "malicious prosecution" in violation
of the Fourth or Fourteenth Amendments?
3) Did probable cause exist to search the Floyds' residence, Gavlock's
residence, and Pletcher's vehicle?
4) Was Waltz the victim of excessive force in violation of the Fourth
Amendment?
5) Were Waltz, Gavlock, and Pletcher unlawfully imprisone on Waltz'property in violation of the Fourth Amendment?
6) Did defendants retaliate against plaintiffs for their speech opposing the PGC's elk program, in violation of the First Amendment?
7) Do plaintiffs state any claim against PGC Executive Director Ross?
8) Are any defendants entitled to qualified immunity?

1. Right to Kill Elk

The parties initially spar over whether Robert Floyd had a federal constitutional right to kill an elk causing or about to cause property damage to his apple trees. We address this issue in the context of Floyd's malicious prosecution claim, see infra Part III.2.

2. Malicious Prosecution

Plaintiff Robert Floyd alleges through 42 U.S.C. § 1983 that he was the victim of malicious prosecution by virtue of his receiving a summary citation for killing an elk. A plaintiff must show the following to succeed on a § 1983 malicious prosecution claim:

(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003) (citing *Donahue v. Gavin*, 280 F.3d 371, 379-80 (3d Cir. 2002)). The first two elements are not in dispute. Instead the parties spar over the remaining three elements. The parties initially focus on the fifth element, whether Robert Floyd suffered any deprivation of liberty. Floyd argues he was deprived of his liberty to kill elk intruding on his property in violation of his Fourth and Fourteenth Amendment rights. Robert Floyd argues that the Fourteenth Amendment affords him the right to shoot elk encroaching on his property. Presumably, such a right would be a liberty or property interest protected by the substantive due process guarantee of the Due Process Clause of the Fourteenth Amendment. However, regardless of the contours of this alleged right, Robert Floyd's claim fails because a malicious Moreover, killing an elk, even an elk

hungrily eyeing one's apples, is not a fundamental right so deeply rooted in our concept of ordered liberty that it could be considered a liberty interest protected by the substantive due process guarantee of the Fourteenth Amendment. See *Christy v. Hodel*, 857 F.2d 1324, 1330 (9th Cir. 1988), cert. denied, 490 U.S. 1114 (1990); see also *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388-89 (1978) (elk hunting by nonresidents not fundamental right under Privileges and Immunities Clause of the Constitution, Article 4, § 2, cl. 1). Ownership of land, on the other hand, "is a property interest worthy of substantive due process protection."

See *DeBlasio v. Zoning Bd. Of Adjustment for the Township of W. Amwell*, 53 F.3d 592, 600 (3d Cir. 1995), overruled in part on other grounds, United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003). That property interest, though, does not extend to killing elk that could cause property damage. See *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1430-31 (10th Cir. 1986) (no entitlement to compensation for damage to property caused by wildlife under takings clause of Fifth Amendment).

At best, Floyd has a qualified state right to protect his property from damage done by wildlife under the Pennsylvania law. See 34 Pa. C.S.A. § 2121 (permitting persons who cultivate, as a primary means of gaining livelihood, to kill game or wildlife); *Commonwealth v. Hagan*, 44 Pa. D&C 4th 516, 548-59 (Elk County Ct.2000) (creating common law exception for killing game or wildlife

if "reasonable necessity" or "justification" exists). In some narrow instances, a state-created property right may qualify as a property interest protected by the substantive due process guarantee of the Fourteenth Amendment. *See Hoffman v. Lehman,* 926 F. Supp. 510, 513 (M.D. Pa. 1996) (Rambo, J.). We need not determine if this is such an instance because, again, a violation of substantive due process is no basis for a § 1983 malicious prosecution claim. prosecution claim cannot be based on substantive due process. See *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (plurality); *DiBella v. Borough of Beachwood,* – F.3d –, 2005 WL 1118012, at *2 (3d Cir. May 12, 2005).Floyd also claims he suffered a deprivation of liberty consistent with the Fourth Amendment's concept of seizure when he received a summary citation for shooting the elk and was required to attend trial on the summary offense. The Third Circuit recently addressed a very analogous situation in *DiBella*. The plaintiffs in *DiBella* received summonses for defiant trespass, a petty disorderly offense under New Jersey law, and were required to attend trial on the charge. 2005 WL 1118012, at *1. They were convicted, but those convictions were eventually reversed. Id. The plaintiffs then brought § 1983 malicious prosecution claims against the arresting authority in federal court. Id. A jury returned a verdict in favor of plaintiffs, but the district court vacated the jury award on the ground that the plaintiffs were never "seized" in violation of the

Fourth Amendment for purposes of their § 1983 malicious prosecution claims. Id. The Third Circuit affirmed, holding that "[a]ttending one's trial is not a government "seizure" in a 42 U.S.C. § 1983 malicious prosecution action for violation of the Fourth Amendment." Id. at *4. Just like the plaintiffs in DiBella, Robert Floyd was charged with a

minor offense and was required to attend trial. Such minima restraints of liberty do not amount to a Fourth Amendmen "seizure." Id. Accordingly, we find that Robert Floyd wa not sufficiently deprived of his liberty so as to constitute violation of the Fourth Amendment. Robert Floyd' malicious prosecution clam therefore fails because he canno establish that he was deprived of a constitutionally protecte liberty.

Even if we were to find that Robert Floyd suffered a unconstitutional deprivation of liberty, we would find that h fails to satisfy the third element necessary to establish a 1983 malicious prosecution claim, viz., that the proceedin was initiated against him without probable cause "'[P]robable cause to arrest exists when the facts an circumstances within the arresting officer's knowledge ar sufficient in themselves to warrant a reasonable person t believe that an offense has been or is being committed by th person to be arrested.'" *Marasco,* 318 F.3d at 514 (quotin *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482 (3d Ci 1995)). Probable cause is typically a jury question. *Marasc* 318 F.3d at 514. Nonetheless, "a district court may conclud 'that probable cause did exist as a matter of law if th evidence, viewed most favorably to Plaintiff, reasonabl would not support a contrary factual finding,' and may ente summary judgment accordingly." Id. (quoting *Sherwood* *Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997)).

The undisputed material facts show that Robert Floy shot the elk, that plaintiff Waltz contacted the PGC to repo that Robert Floyd had shot the elk, and that the elk wa found shot dead on Robert Floyd's property. (See Rec. Do No. 12, at ¶¶25, 30, 33.) Also undisputed are the facts that

Robert Floyd shot the elk outside permissible elk hunting periods without a license, and that Floyd refused to speak with officer Deniker about the incident. (Id. at ¶¶38, 51, 104.) Given Floyd's lack of cooperation, Deniker had no reason to believe the elk was shot with justification under either 34 Pa. C.S.A. § 2121 or Hagan.

The totality of these circumstances would lead a prudent officer in Deniker's position to conclude that Robert Floyd had violated § 2307 and that the issuance of the summary citation under that section was appropriate. For these reasons, we believe no reasonable jury could find that proceedings were initiated against Robert Floyd without probable cause. In sum, Robert Floyd fails to establish the third and fifth elements necessary to make out a § 1983 malicious prosecution claim. Accordingly, we will grant summary judgment for defendants on Floyd's malicious prosecution claim.

3. The Searches of the Floyds' Residence, Arthur Gavlock's Residence, and James Pletcher's Vehicle

Plaintiffs Robert and Jean Floyd, Gavlock, and Pletcher claim the search warrants to search their residences and vehicle for the firearm used to kill the elk lacked probable cause. A search warrant must be supported by probable cause to satisfy the Fourth Amendment. See *United States v. Harris,* 403 U.S. 573, 577 (1971). Probable cause exists if there is "fair probability that contraband or evidence of a crime will be found in a particular place." See *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Search warrants should be upheld so long as the issuing authority had a substantial basis for finding probable cause. See *Gates*, 462 U.S. at 238; *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001). To make this determination, we only look at the affidavits in

support of probable cause. See *Hodge,* 246 F.3d at 305. Or its face, the affidavit submitted in support of the applicatior to search the Floyd residence provided the magisteria district judge a substantial basis to find probable cause. In the affidavit, officer Wasserman summarized the events o the day officers Deniker and McDowell went to the Floy residence to remove the elk carcass. (See Defs.' Exs., Rec Doc. No. 13, Ex. 1, Attach. 4.) Wasserman(correctly indicated in the affidavit that Robert Floyd sent a notarize letter to the PGC in which he admitted to shooting the elk (Id.; see also id. at Attach. 1.) Subsequent lab analysis of th bullet removed from the carcass indicated the bullet wa fired from a select class of firearms. (Id. at Attach 4. Wasserman twice attempted to obtain the firearm throug discussions with Robert Floyd's attorney, Robert Mille Esquire, who indicated that he would try to obtain th firearm from Floyd. (Id.) Attorney Miller eventually tol Wasserman that he no longer represented Floyd and that h failed to obtain the firearm from Floyd. (Id.) The facts in th affidavit clearly suggest that Robert Floyd shot the elk with certain type of firearm and that he likely still possessed th firearm. Under the totality of the circumstances, a substanti basis existed for finding probable cause to search the Floy residence.

The second and third affidavits, submitted in suppo of the applications to search Gavlock's residence an Pletcher's vehicle, also provided the magisterial distri judge substantial bases to find probable cause. Bot affidavits indicate that, after failing to find the firearm at th Floyd residence, Wasserman learned from Jean Floyd tha her husband sold the firearm to Gavlock so the firearm coul not be seized by the PGC. (Id. at Attach. 6.) Robert Floyd

conveyed the firearm (identified by make and serial number) to Gavlock for one dollar with a buyback option for the same amount. (Id. at Attach. 5 & 6.) Robert Floyd signed the agreement, as did his wife and Waltz as witnesses. (Id.) The agreement was dated the same day Wasserman last spoke with Attorney Miller. (Id. at Attach. 6.) Miller had informed Waltz, who in turn informed the Floyds, about the PGC's interest in obtaining the firearm. (Id.) Wasserman also indicated in the affidavit that both Waltz and Gavlock were members of CAEPPR and, through that association, had reason to be sympathetic to Robert Floyd's plight. (Id.) The third affidavit contains the same information as the second affidavit, as well as additional information indicating that, shortly after leaving the Floyd residence, Wasserman observed Gavlock as a passenger in a vehicle operated by Pletcher, another CAEPPR member. They drove to and then entered Waltz's residence. (Id. at Attach. 7.) Wasserman believed this observation to be consistent, timing-wise, with Jean Floyd's calling Gavlock or Pletcher to tell them that the PGC was searching for the firearm so they could move or conceal it. (Id.) Given the sequence of events, a fair probability existed that the firearm was at Gavlock's residence or in Pletcher's vehicle. The sales agreement conveying the firearm to Gavlock, and Jean Floyd's statements, strongly suggested that the firearm was in Gavlock's possession. Further, Gavlock was seen shortly after the failed search of the Floyd residence heading towards Waltz's residence. Waltz's involvement was apparent from his signing of the sales agreement, and his presence and behavior at the scene on the day the elk was shot. It was reasonable to surmise that a fair probability existed that Gavlock and Pletcher may have been moving the

firearm. Overall, the totality of the circumstances show substantial bases existed for finding probable cause to search both Gavlock's residence and Pletcher's vehicle. Finally plaintiffs contend that the searches were somehow void *ab initio* because it was unnecessary to obtain the firearm. This contention is irrelevant to our review of the magisterial district judge's probable cause determinations. Accordingly we will grant summary judgment for defendants on the unlawful search claims.

4. Excessive Force Used Against Waltz

Plaintiff Waltz claims that officer Deniker used excessive force against him when Deniker restrained Waltz at the Floyd residence the day the elk was shot. To establish an excessive force claim, Waltz must show that he was seized within the meaning of the Fourth Amendment and that the seizure was unreasonable. *Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004). A seizure occurs whenever an officer uses physical force or a show of authority to restrain a person's freedom to walk away, and a reasonable person would not feel free to walk away. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). It is undisputed that Deniker restrained Waltz by holding him or putting him in a "bear hug."

Whether a seizure was reasonable is an objective inquiry made from the perspective of a reasonable officer on the scene, not from hindsight, and without regard to the officer's intent or motive. See *Graham*, 490 U.S. at 396; Rivas, 36 F.3d at 198. A number of pertinent factors should be considered, including but not limited to the severity of the crime being investigated, the threat posed by the person seized, the duration of the seizure, and the number of persons with whom the officer must contend with at the time. Rivas,

36 F.3d at 198. The undisputed facts are that Deniker repeatedly told Waltz and others present that he was conducting an investigation and wanted to speak with the Floyds. (See Rec. Doc. No. 12, at ¶¶38, 45, 49.) Waltz repeatedly told the officers that the Floyds did not wish to be bothered in spite of Deniker stating that he needed to speak with Robert Floyd as part of the investigation. (Id. at ¶¶35, 38, 42, 45.) Waltz attempted to shut the outer door of the Floyd residence on Deniker. (Id. at ¶43.) Deniker blocked the door from closing and told Waltz that he was interfering with an investigation. (Id. at ¶45.) Deniker then placed Waltz in a bear hug. (Id. at ¶¶46-47.) Waltz resisted and tried to get loose. (Id.) Once Waltz stopped resisting, he was released. (Id.) Deniker again told Waltz that he was interfering with an investigation. (Id. at ¶¶46-47, 49.)

The only factual dispute is over whether Waltz sped up to get to the inner door to block Deniker's entry. Waltz admitted at his deposition that he sped up to get to the outer door before Deniker, but he only did so to avoid a confrontation between the officers and the Floyds, and to get a camera to take a picture of the elk carcass. (Rec. Doc. No. 13, Ex. 9, at 57.) According to Waltz, after he tried to close the outer door, he turned to go through the inner door but Deniker hit him "in the back with all his force," held him for more than an instant, and caused him some pain or injury. (Id. at 60-61.) Mindful that "[t]he reasonableness of the use of force is normally an issue for the jury," see Rivas, 365 F.3d at 198, we believe a reasonable jury could determine that Deniker used excessive force.

Therefore, we will not grant defendants' summary judgment motion as to Waltz's excessive force claim.

5. Unlawful Imprisonment

Plaintiffs Waltz, Gavlock, and Pletcher claim they were unlawfully imprisoned on Waltz's property on August 7 2003. That was the day officers Wasserman and Deniker and Supervisor Stout maintained a position across the road from the Waltz residence and later searched Pletcher's vehicle and Gavlock's residence. To state a claim for false imprisonment under § 1983 in violation of the Fourth Amendment, (as incorporated by the Fourteenth Amendment), plaintiffs must show that (1) a Fourth Amendment seizure occurred, and (2) the seizure was made without probable cause. See *Dowling v. City of Philadelphia* 855 F.2d 136, 141 (3d Cir. 1988). As discussed above, a seizure occurs whenever an officer uses physical force or a show of authority to restrain a person's freedom to walk away, and a reasonable person would not feel free to walk away. *Bostick*, 501 U.S. at 434; *Graham*, 490 U.S. at 39 n.10. The undisputed material facts establish that a seizure never occurred. The officers merely observed the Waltz residence and Pletcher's vehicle from a distance; they never prohibited anyone from leaving. (Rec. Doc. No. 12, at ¶¶92 93.) Prior to being surveilled, Gavlock walked away from Wasserman. (Id. at ¶87.) A number of people came and went to the residence during the period in question without any interference by the surveilling officers. (Id. at ¶¶90-93. These facts plainly show no seizure occurred – so plain, in fact, that plaintiffs do not oppose defendants' motion in this respect. For these reasons, then, we will grant summary judgment for defendants on this claim.

6. Retaliation for Exercising First Amendment Rights

Plaintiffs claim defendants harassed, intimidated, and selectively prosecuted them in retaliation for their speaking out against the PGC's elk policy and for associating with a group (CAEPPR) that opposed PGC's elk policy. To prove a First Amendment retaliation claim, plaintiffs must show that: (1) they engaged in protected activity; (2) defendants retaliated by taking adverse action against plaintiffs; and (3) the protected activity was the cause of the retaliation. Marasco,318 F.3d at 512 (citing Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997)). Plaintiffs can establish the first element. They engaged in protected activity by speaking out against the PGC's elk policy and by associating with a group (CAEPRR) that opposed the policy. They cannot establish the third element because they cannot show that their protected activity "was a substantial or motivating factor in the alleged retaliatory action." *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 493 (3d Cir. 2002). The events material to this action only began to unfold when someone called the PGC to report the shooting of the elk at the Floyd residence. (Rec. Doc No.12, at ¶¶30, 33.) The incident between Deniker and Waltz occurred because Waltz insisted on preventing Deniker from talking to the Floyds. (Id. at ¶¶38-51.) Robert Floyd was cited with a violation of § 2307(a) because he shot an elk without a license and because it appeared he did so without legal justification. (Id. at ¶¶61, 72.) The Floyd residence was searched because Robert Floyd would not turn over the firearm used to shoot the elk, even though he admitted to shooting it. (Id. at ¶¶70-71, 77.) The subsequent surveillance of the Waltz residence, and subsequent searches of Gavlock's residence and Pletcher's vehicle, were a result of Wasserman's learning that these individuals were concerting to hide the firearm. (Id. at ¶¶80-87.) All of these events occurred without regard to plaintiffs'

individual or collective opposition to the PGC's elk policy. The only references to CAEPRR came in the affidavits in support of the applications for search warrants to search Gavlock's residence and Pletcher's vehicle. Gavlock and Waltz stated at their depositions that they never had any real problem with PGC personnel by virtue of their association with CAEPPR. (Rec. Doc. No. 13, Ex. 9, at 120-21, 130-31; Ex. 10, at 70, 76-80.)

Robert Floyd did not even know if anyone knew he associated with CAEPPR. (Id., Ex. 7, at 18.) The undisputed material facts reveal an insufficient causal link between the protected activity and the alleged retaliation. In their opposition brief, plaintiffs cite no supporting authority for their position. They only make reference to other incidents that allegedly gave defendants motive to retaliate against plaintiffs. These other incidents, unsupported by facts of record, are discrete from the events unfolding after Robert Floyd shot the elk. Taking all of the above into consideration, the court finds that defendants are entitled to summary judgment on plaintiffs' First Amendment retaliation claim.

7. Whether Any Claim is Stated Against Defendant Ross

The parties also argue over whether any claim has been stated against defendant Vernon Ross, PGC Executive Director. Plaintiffs' only reference to defendant Ross in the opposition brief is that he supervised and guided the other defendants' actions. Ross had no personal involvement in the underlying events of this case. As such, no claim has been stated against Ross because *respondent superior* liability will not lie in a § 1983 action. See *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

8. Qualified Immunity

Qualified immunity is a two-step inquiry: (1) whether the facts allege a deprivation of an actual constitutional right, and if so, (2) whether the right was clearly established at the time of the alleged violation. *Saucier v. Katz,* 533 U.S. 194, 200 (2001); Kopec v. Tate, 361 F.3d 772, 776 (3d Cir. 2004). We already determined that a deprivation of a constitutional right may have occurred only in connection with Waltz's excessive force claim. See supra Part III.4. We therefore only need to consider the second step of the qualified immunity inquiry with respect to that claim.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Deniker (and McDowell) confronted a situation wherein they repeatedly made it known to Waltz and others present that they were investigating the elk shooting and needed to speak with the Floyds. (Rec. Doc. No. 12, at ¶¶38, 43, 45-47, 49.) Waltz told the officers that he spoke on behalf of the Floyds, that the Floyds did not want to talk, and that Deniker should speak with attorney Miller. (Id. at ¶¶38, 42.) When Deniker moved towards the outer door, Waltz sped up to get there first, and then tried to shut the door behind him. (Id. at ¶43; Rec. Doc. No. 13, Ex. 9, at 57.).

By this point, a reasonable officer had ample reason to believe that Robert Floyd shot the elk in violation of 34 Pa. C.S.A. § 2307 and that Waltz was obstructing the investigation of the shooting, which itself is a summary offense. See 34 Pa. C.S.A. § 904(a). Given these circumstances, a reasonable officer would be justified in temporarily restraining Waltz. Whether or not Deniker used

excessive force to restrain Waltz is a separate questio irrelevant to our qualified immunity analysis; the pertinen inquiry is whether a reasonable officer would think "the la clearly proscribed the actions" taken by Deniker. *Mitchell* v *Forsyth*, 472 U.S. 511, 528 (1985). Even viewing all th facts in a light most favorable to Waltz, we do not believe reasonable officer would believe the law clearly proscribe him or her from temporarily restraining a man wh repeatedly said the subject of an investigation would nc speak with the officer, and who sped up to get to th subject's house first and then tried to close the door on th officer. As this is an objective determination, Waltz' subjective motives for his actions, such as his assertion tha he sped up to avoid a confrontation between the officers an the Floyds and to get a camera to take a picture of the el carcass, is irrelevant. For these reasons, we rule that Denik is entitled to qualified immunity as a matter of law as t Waltz's excessive force claim. We also note that, were w not ruling in defendants' favor on plaintiffs' other claims, w would rule in the alternative that defendants were entitled t qualified immunity with respect to those claims. Our abov discussions of those claims reveal that reasonable officers i defendants' positions would not believe their actions violate clearly established rights. Reasonable officers would n believe so particularly in light of the existence of probab cause to cite Robert Floyd with a violation of § 2307, and light of the officers' having no reason to doubt the validity o the search warrants for Floyds' residence, Gavlock residence, and Pletcher's vehicle.

CONCLUSION:

For the above reasons, we find defendants are entitled to summary judgment as a matter of law on all of plaintiffs' claims. An appropriate order follows.

s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ARHTUR GAVLOCK, ADAM WALTZ, JAMES P. PLETCHER, ROBERT FLOYD, and JEAN FLOYD

Plaintiffs,

v.

WCO CLINT DENIKER, WCO WASSERMAN, WCO DOTY MCDOWELL, SUPERVISOR RONALD STOUT, and VERNON ROSS,

Defendants.

No. 4:04-CV-0247

(McClure, J.)

ORDER
May 27, 2005

For the reasons set forth in the accompanying memorandum, **IT IS ORDERED THAT:**

1. Defendants' motion for summary judgment (Rec. Doc. No. 11) is
granted.

2. Final judgment is entered in favor of defendants and against plaintiffs.

3. The clerk is directed to close the case file.

s/ James F. McClure,
James F. McClure, Jr.
United States District,J